Ref. No. 356

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

July 24, 1991

UNITED STATES OF AMERICA, Complainant v. ZOEB ENTERPRISES, INC., D/B/A PAPA SAM'S DELI, D/B/A PAPAYA PARADISE, Respondent	8 U.S.C. 1324a Proceeding OCAHO Case No. 91100077

ORDER DENYING COMPLAINANT'S MOTION FOR DEFAULT JUDGMENT

On July 15, 1991, Complainant filed a Motion for Default Judgment, in which the following facts were set forth.

Respondent was served with a Notice of Intent to Fine on January 23, 1991 and Respondent's predecessor counsel timely filed a Request for Hearing on February 20, 1991.

On May 13, 1991, Respondent was served with the Complaint at issue and the parties, by and through their respective predecessor counsel, stipulated and agreed that the date by which Respondent's answer was to have been filed had been extended to June 19, 1991.

On or about June 17, 1991, Attorney Clau
contacted Complainant's current counsel by
that he was entering his appearanc
succeeding Douglas Menagh, Esquire
an extension of time in which to f
behalf.

Complainant's counsel refused
an extension of time in which to f
two reasons: (1) predecessor coun
motion concerning his withdrawal a
to file a notice of appearance, as
procedural rules, 28 C.F.R. § 68.3
respectively; and (2) for the furt
extension of time for filing a res
upon between Complainant's current
predecessor counsel, who was then
owing to Respondent's attorneys' h
concerning withdrawal, as well as

Complainant's Motion for Default Judgment also sets forth the facts that on June 20, 1991 Respondent's successor counsel telephoned the undersigned's secretary to advise of his entering his appearance herein and that on Friday, June 21, 1991 Respondent's successor counsel telefaxed a letter to the undersigned in which he requested an extension of time, until June 26, 1991, in order to file a responsive pleading.

On Monday, June 24, 1991, the undersigned directed correspondence to Messrs. Winkowski and Kleefield, the parties' current counsel of record, advising therein that Mr. Kleefield's request for an expanded pleading period had been granted, that Respondent's answer would be due on or about June 26, 1991, and that following receipt of that responsive pleading a telephonic pre-hearing conference would be conducted in order to select the earliest mutually convenient hearing date, enabling us to proceed in the orderly handling of this matter.

On July 1, 1991, Respondent filed its answer to the complaint.

In its Motion for Default Judgment, Complainant urges that that responsive pleading was untimely filed, having been filed some six days after June 26, 1991, the date specified in my June 24, 1991 correspondence. Complainant further notes in its motion that Respondent's answer was signed by Respondent firm's president, rather than by Respondent's successor counsel.

The Federal courts have consistently held that default judgments are generally not favored, and any doubts are to be resolved in favor of a trial on the merits. Berthelsen v. Kane, 907 F.2d 617, 620 (6th Cir. 1990); United Coin Meter Co. v. 705 F.2d 839, 845 (6th Cir. 1983). have affirmed that principle. No. 90100179 (Aug. 29, 1990);) Case No. 89100180 (Oct. 11, 39); U.S. v. Tiki Pools, OCAHO 'quoting Davis v. Parkhill-. 1962)).

ere the delay is minimal, and in cern of disregard for court f policy in favor of deciding esorting to the extreme remedy of ally in those instances, as experienced by the court or the ms Service v. William Darrah & 1 Cir. 1986); INVST Financial 5 F.2d 391, 398 (6th Cir.), cert. 705 F.2d at 845 (enumerating the

three factors to weigh in setting aside default as "(1) {w}hether the plaintiff will be prejudiced; (2) {w}hether the defendant has a meritorious defense; and (3) {w}hether culpable conduct of the defendant led to the default," (quoting Feliciano v. Reliant Tooling Co., 691 F.2d 653, 656 (3d Cir. 1982))); U.S. v. DuBois Farms (applying three factor test).

A review of OCAHO rulings reveals that in those cases based upon a respondent's failure to file a timely answer, default judgments will not be entered unless good cause is shown. U.S. v. Shine Auto Service, OCAHO Case No. 89100180 (June 16, 1989) (Order Denying Default); vacated by CAHO (July 14, 1989) at 3. See also U.S. v. DuBois Farms at 2 (applying good cause standard).

Given those rulings, it must be determíned whether Respondent under these facts has demonstrated good cause for having filed its answer some 12 days after the date initially stipulated by predecessor counsel, whether that delay was willful, and whether the untimely filing of the responsive pleading prejudiced the Complainant in any manner.

It is found that Respondent's successor counsel's reason for having requested an extension of time in which to prepare and file an answer on his client's behalf namely, his having been retained only two days before the stipulated date upon which that pleading was due, is meritorious and constitutes good cause for our purposes.

Meanwhile, Complainant has failed to demonstrate that Respondent has not acted in good faith, nor has it b Complainant has been prejudiced by the filing of Res answer on July 1, 1991, or some five days followinq filing date.

Accordingly, Complainant's Mot hereby ordered to be denied and th hearing on the earliest mutually c location most convenient to the pa counsel.